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UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

REGION 19

Nexstar Broadcasting, Inc. dba KOIN-TV, Respondent, and National Association of Broadcast Employees & Technicians, the Broadcasting and Cable Television Workers Sector of the Communications Workers of America, Local 51, AFL-CIO, Charging Party.	No. 19-CA-248735, 255180, 259398, 262203 **POST-HEARING BRIEF TO THE ADMINISTRATIVE LAW JUDGE BY CHARGING PARTY, NABET-CWA LOCAL 51**

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Federal Cases

NLRB Cases

Federal Statutes

State Statutes

This matter is before the Honorable Amita B. Tracy, Administrative Law Judge, on a Consolidated Complaint alleging that Nexstar Broadcasting, Inc., d/b/a KOIN-TV (the Respondent) violated Sections 8(a)(1) and (5) of the National Labor Relations Act (the Act). Charging Party, NABET Local 51 ("Union") submits this brief.

As set forth in more detail below, the record supports the following violations by Respondent, as alleged in the Consolidated Complaint:

- Respondent failed and refused to bargain in good faith in 2019, instead engaging in "surface bargaining," causing unnecessary delays, making obstructive proposals, and attempting to condition bargaining about mandatory subjects upon nonmandatory bargaining over the Union's internal affairs, all the while denigrating the Union to represented employees;
- Respondent failed and refused to bargain wages;
- After a year of bad-faith, dilatory and obstructive tactics in bargaining, Respondent withdrew recognition of the Union on January 8, 2020 without objective evidence that the Union had lost majority support;
- Upon announcing the "exciting news" of its improper withdrawal of recognition, Respondent let the employees in the bargaining units know that a raise was coming in the future; and Respondent did in fact institute a 1.5 percent wage increase without prior notice and opportunity to bargain, after Respondent had failed and refused to make a wage proposal in two years of bargaining;
- Respondent implemented unilateral changes without prior notice and opportunity to bargain by assigning bargaining unit work to non-bargaining unit individuals;
- Respondent implemented a unilateral change without prior notice and opportunity to bargain by changing its vacation selection policy;
- Respondent implemented a unilateral change without prior notice and opportunity to bargain by removing the Union's bulletin boards at the station;

- Respondent interfered with represented employees' section 7 rights by directing employees not to talk about the Union, not to hand out Union bulletins, and not to discuss wages and wage increases; and by making an implied threat to an employee to revoke wage increases if employees discuss wage increases with each other.

I. SUMMARY OF FACTS

A. JURISDICTION AND BACKGROUND

The jurisdictional facts are admitted by Respondent (see Respondent's Answer to Second Consolidated Complaint, GC Exh 1(bb), pp. 3-4, admitting the allegations in paragraphs 2 and 3 of the Complaint).

Respondent operates a television station, KOIN-TV, in Portland, Oregon. (*Id.*, paragraph 2(a).) The Union is the exclusive bargaining representative of the engineers, production employees, news and creative services employees, and web producers employed by the Respondent at KOIN-TV. (*Id.*, paragraphs 5(a) and (b), admitted in Respondent's Answer.) The Union was the exclusive bargaining representative of the same units employed by Media General KOIN-TV prior to January 2017. Respondent purchased the business of Media General KOIN-TV in January 2017, and has continued to operate the business in basically unchanged form, employing former employees of Media General KOIN-TV as a majority of its employees. As such, Respondent admits that it is the successor to Media General KOIN-TV. (*Id.*, paragraphs 2(b) and (c) and 5(b).)

B. STIPULATED FACTS REGARDING BARGAINING

The most recent collective bargaining agreement (CBA) was in effect from July 29, 2015 to July 18, 2017, with the last extension having expired in September 2017. (Joint Exh. 1, Partial Stipulation of Fact, Stipulations 1 and 2.)

The parties met for successor contract bargaining on 42 total dates (21 sets of two consecutive dates) between June 2017 and December 2019. (*Id.*, Stipulation 3.) Respondent's bargaining team was comprised of: Vice President of Labor and Employment Relations Chuck

Pautsch; President Tim Busch (who participated only through January 1, 2019); then-KOIN Vice President and General Manager Patrick Nevin; then-KOIN Business Administrator/Human Resources Representative Casey Wenger; KOIN Director of Technical Operations Rick Brown; and KOIN News Director Rich Kurz. Pautsch has served as Respondent's lead negotiator since early in the bargaining. (*Id.*, Stipulation 4.) Throughout bargaining, the Union's bargaining team was comprised of President Carrie Biggs-Adams and a KOIN employee representative. Ellen Hansen served as the employee representative from about October 12, 2017 through the end of bargaining in December 2019. Biggs-Adams was the lead negotiator throughout. (*Id.*, Stipulation 5.) An FMCS mediator also participated in all sessions from March 22, 2018 through December 2019. (*Id.*, Stipulation 6.)

The parties stipulated to numerous Joint Exhibits, including the proposals exchanged, the Union's bargaining notes, and Respondent's bargaining notes, as listed in more detail in Joint Exhibit 1. (*Id.*, Stipulations 7-16.)

C. RESPONDENT'S SURFACE BARGAINING TACTICS AND OTHER VIOLATIONS OF THE DUTY TO BARGAIN IN GOOD FAITH IN 2019

In 2019, Respondent engaged in numerous tactics to prevent progress in the bargaining, made no wage proposal, stopped dues checkoff, and all the while relentlessly disparaged the Union to the represented bargaining units' members.

1. Tactics to delay, refusals to meet frequently and/or at length

Ms. Hansen and Ms. Biggs-Adams testified that their contemporaneous notes of the bargaining sessions were true and correct:

On January 25, 2019, the management bargaining team was an hour and a quarter late, and its chief spokesperson, Charles Pautsch, left early at 1:41 p.m. (JX 14, pp. 2-3.)

In February, the parties did not meet because Respondent did not want to bargain during "sweeps" – four-week periods that take place four times per year, in which television ratings are more valuable. (RT 108.) While it frequently occurred that Respondent offered no availability during sweeps, it was not acceptable to the Union to eliminate the possibility of scheduling

bargaining meetings four months out of every year. On Respondent's bargaining team, no one was directly involved in producing news except the news director, who was not an integral part of their team, and he was not always there. (RT 169-170.)

On April 23, the management team was late by an hour and 10 minutes. (*Id.* at p. 4.) They claimed they had no availability in May, which was a sweeps month. (RT 148.)

On June 27, Mr. Pautsch left early again at 2:45 p.m. (JX 14, p. 12.) For their next meeting, the Union offered dates in July, but Respondent claimed July was booked. (JX 13, p. 13.)

At the parties' next meeting on August 15, there was a joint session from 9:10 to 9:35 a.m., and the management team left to caucus and did not return the rest of the day. (JX 13, pp. 17-18.)

On October 7, the management team was one hour late. (JX 14, p. 13.)

On October 9, the management team was late by an hour and five minutes. (*Id.*, p. 16.) Although the Union offered dates to bargain in November, Respondent claimed that they were not available in November, without explanation. (RT 225-6.) Respondent left early in the afternoon. (RT 234.)

2. <u>Tactics to denigrate and undermine the Union</u>

While preventing progress at the bargaining table, at the workplace, Respondent was unfairly disparaging the Union via memos to the bargaining units' members. The memos went out under the signature of then-General Manager Pat Nevin, but they were written by Charles Pautsch. Respondent frequently reiterated in these memos its false claim that the Union's initiation fee amount was "exorbitant." To the contrary, the Board's Office of General Counsel has dismissed the claim, finding the Union's fee to be "comparable to that of similarly situated cities and localities." (CPX 2, p. 13.) As examples of the memos' attacks:

- The March 5 memo represented to employees that "we find your current union dues and fee structure to be exorbitantly high and we are doing everything we can to reduce your out of pocket expenses." (JX 21, p. 1, second para.) The memorandum also mischaracterized the Union's efforts to negotiate for the health

benefit to include coverage of certain types of care as a "waste[] [of] valuable time." (*Id.* at p. 2, second para.)

- The May 31 memo attacked the Union's bargaining spokesperson, Carrie Biggs-Adams, claiming that prior contract negotiations with a different management group (of which Nevin and Pautsch had no personal knowledge) were focused on "petty" issues and that "very little progress [was] made during each bargaining session," supposedly due to Ms. Biggs-Adams. The same May 31 memorandum characterized the Union's initiation fees and monthly dues as "exorbitantly high," and that "you deserve better." Mr. Nevin further claimed, inaccurately and misleadingly, that "the National Labor Relations Board in Seattle has found meritorious two charges KOIN has filed against Ms. Biggs Adams for bargaining in bad faith." (JX 25.) That was a mischaracterization; no findings had been made that the Union bargained in bad faith. Instead, just one Complaint had been issued for an alleged failure by the Union to respond to a request for information, and that single Complaint had not reached the hearing stage.[1] By contrast, not only had four Complaints been issued against Respondent; in addition, two Administrative Law Judges had made findings that Respondent violated the Act on three occurrences (two of which had been consolidated for hearing) and one of those decisions had already gone to the Board, which rejected Respondent's exceptions and approved the Administrative Law Judge's decision.[2]

- The June 20 memo misrepresented to employees that the Union was unprepared and unwilling to negotiate about wages. In fact, the Union had made a wage proposal on April 24. Respondent, however, never made any wage proposal. Nevin/Pautsch again attacked the "exorbitant" initiation fees and monthly dues. In addition, Nevin/Pautsch again mischaracterized the status of one of Respondent's charges against the Union, claiming that the "NLRB issued a Merit determination" on case 19-CB-223109, which had been dismissed. (JX 26, JX 66.)

- The July 22 memo again attacked Ms. Biggs-Adams, claiming that she was "enraged with the fact that we were not addressing her as President Biggs-Adams," "silly," and "just can't focus." Nevin/Pautsch criticized the initiation fees and included a link to the National Right to Work Foundation website. (JX 30.)

[1] Respondent's charge in Case 19-CB-234944 has since been closed on compliance. (JX 66.)

[2] Those cases are 19-CA-211026 (Board approved ALJ's decision that Respondent violated section 8(a)(5) by refusing to provide information, closed on compliance [JX 66]); 219985 and 219987 (after ALJ proposed decision finding Respondent violated section 8(a)(5) by making unilateral changes; Board has since issued decision rejecting Respondent's exceptions; Respondent refused to comply and the matter is now pending before the Ninth Circuit for enforcement [JX 66 and see Board decision at JX 63, pp. 101-110]; 232897 (since the time of Nevin/Pautsch's memo, the ALJ's proposed decision [JX 63, pp. 41-60] found Respondent engaged in interference against Ellen Hansen's Union activity, and the Board has now issued its decision rejecting Respondent's exceptions [370 NLRB No. 68]).

- The August 2 memo announced that Respondent was stopping dues checkoff.[3] It also misrepresented that the Union had told employees, when prior contracts had expired, that they could or would be fired if they stopped paying dues or refused to join the Union. It concluded, "you will notice a net increase in these [pay]checks, due to the absence of any related union payment deductions…" (JX 32.)

- The August 20 memo subjected the bargaining unit employees to another Nevin/Pautsch editorial regarding the Union's fees and dues. (JX 38.)

- The October 14 memo attacked the Union for waiving initiation fees to those who joined that month, which it characterized as "trickery." It then continued to represent to bargaining unit employees that the Union's initiation fees are "SKY-HIGH." It expressly urged employees not to join the Union: "It's fool's gold. In our opinion, you would do better to hold onto your hard-earned money." (JX 43.)

Respondent demonstrated disrespect for the Union President personally in the memos to the bargaining units members, and in some memos falsely disparaged her. While the Union President herself handled the bargaining -- demonstrating the Union's dedication of valuable time, experience, and resources to the efforts on the KOIN bargaining units' behalf, the Pautsch/Nevin memos dated March 5, May 31, and June 20, 2019 mischaracterized the Union's bargaining spokesperson as the "assigned union representative" or "business representative." (JX 21, 25, 26.) Then, while the Pautsch/Nevin memos dated July 22, August 20, and October 14 acknowledged President Biggs-Adams' participation, the memos resorted to personal attacks smacking of gender stereotypes. The July 22 memo sniped, "Your representation is without direction, focus and is quite frankly narcissistic…Frankly, it seems it is more 'about her' than anything else…she became enraged with the fact that we were not addressing her as President…silly…just can't focus…" (JX 30.) The August 20 memo falsely claimed that "we spend more time trying to keep her focused on the real objective of contract ratification." (JX 38, p. 3.) The October 14 memo mischaracterized the Local Executive Board's decision to waive the initiation fee in October as an individual "dirty trick" by Ms. Adams to "sneak back into your pockets," "desperate to keep her hold on you…" (JX 43.) But Mr. Pautsch had no

[3] At the time, it could have been considered an unlawful unilateral change under prior Board law; however, the Board has since decided that an employer is allowed to discontinue dues checkoff after contract expiration.

basis to doubt that the Local Executive Board had made the decision by passing a formal resolution (RT 694).[4]

3. Respondent's proposals designed to prevent coming to agreement and lack of a wage proposal

A number of Respondent's proposals were designed to prevent coming to an agreement, because Respondent knew or should have known that the Union could not in good conscience agree to such proposals; and at the same time, Respondent failed and refused to make a wage proposal to move the process forward:

- With respect to healthcare, Respondent proposed on January 24, 2019 that bargaining units employees would be "treated the same" as other station employees and that the "company reserves the right to change or replace in whole or in part, the Company's insurance and benefit plans…" (JX 8(a).) At the bargaining table, Respondent advised that this meant the employees would pay 10.4 percent of earnings towards their healthcare on Respondent's self-insured plan, which would be a different contribution amount every pay period depending upon the employees' earnings. (RT 93-94.) Ms. Biggs-Adams knew that 10.4 percent was the maximum amount of their income that Respondent could charge the employees to contribute under the Affordable Care Act. (RT 106.) The bargaining unit employees' healthcare under the expired CBA had set a dollar limit upon the employees' cost. (JX 2, p. 25 [p. 28 of the pdf file].) By contrast, Respondent was proposing that Respondent could change the benefits at will; Respondent's spokesperson Pautsch told the Union too merely "trust us, it'll be fine." (RT 171.) Unsurprisingly, the Union found Respondent's "just trust me" model of benefits unpalatable. (JX 17, p. 000039.) While Respondent demanded information about the union member benefits available only to union members (as opposed to agency fee-payers), harassing the Union with repeated iterations of these demands on August 15, August 16, and October 9 (JX 33, JX 36, JX 42), the Union responded that it can neither impose union membership on bargaining unit members who are not interested in joining nor relinquish its duty to represent non-members in the bargaining unit in the collective bargaining process (JX 34, JX 37).

- In addition, in relationship to healthcare, Respondent viewed the Union's efforts to negotiate for coverage of abortion and gender dysphoria treatment as a "waste

[4] Respondent's original allegation in case 19-CB-257037 was that the October waiver of initiation fee supposedly violated the Act. That charge was dismissed, and the dismissal of that allegation was upheld, although the Office of General Counsel partially sustained the appeal based upon a different issue. (JX 63, pp. 33, 38.) As to the "partial sustain" under that case number, it has been settled without admitting any violation of the Act. (*Id.* at p. 21.) The Office of General Counsel has rejected Respondent's objection to the settlement. (JX 68, attached to the Joint Motion to Reopen which was granted post-hearing.)

[] [of] valuable time." (JX 21, p. 2, second para and RT 685 [Pautsch testified that it reflected "our opinion" that it was a waste of time.) Respondent was not willing to cover those treatments under its own self-insured plan, although there was no legal impediment to doing so. (RT 390, 686-7.) Nor did Respondent provide information about the cost Respondent dedicated to the health plan so that the Union could investigate alternative plans for a similar level of cost (summarized with references to the record below at subpart 4), nor did Respondent provide any alternative proposals or otherwise substantively respond to the Union's proposal for coverage of abortion and gender dysphoria treatment.

- With respect to wages, Respondent refused to make a proposal. The Union made a wage proposal on April 24 (JX 9), the very night the Union received the information it had requested on January 24 and again on April 24 regarding the wage rates of all bargaining units members (JX 19, JX 23; see also RT 139-140). Biggs-Adams testified, and Pautsch did not deny, that she explained at the bargaining table that the proposal sought parity with those who had been hired in more recent times at higher rates than the minimums set forth in the expired contract. (RT 143, 264-5.) At meetings after the Union sent Respondent the Union's proposal, the Union reminded Respondent about the wage proposal and asked Respondent to respond and make a counter-proposal. But Respondent did not counter or make any substantive response designed to move the negotiation forward; instead, Respondent merely dismissed the Union's proposal with comments like "you're just crazy"; or told the Union to bargain against itself by making another proposal. (RT 158-9; 182.) Moreover, at the December 10, 2019 session, Respondent again demanded that the Union bargain against itself by making another wage proposal without any counter from Respondent, and when Biggs-Adams declined and talked about why the Union's wage proposal was appropriate, Pautsch reverted to the subject of the Union's initiation fee. (RT 264-6.) Upon announcing its withdrawal of recognition on January 8, 2020, Respondent advised the employees that Respondent would refrain from providing raises for 45 days – obviously providing the message that now that Respondent was not bargaining with the Union, the employees were soon to get a raise. (RT 453-4, GCX 4 and 7.)

- Respondent's proposals regarding union security and dues checkoff proposed changes to the Union's internal affairs. To put this in context, in a March 5, 2019 memo to the employees, Respondent suddenly claimed that the Union's dues and initiation fee were "exorbitantly high" and that Respondent was "doing everything we can to reduce your out of pocket expenses." (JX 21.) Respondent's April 23 proposal regarding union security, which continued to be Respondent's last proposal on Article 2 until Respondent withdrew recognition, sought to govern the process by which the Union would internally determine whether an individual's membership was in good standing. (JX 5(h).) As Ms. Biggs-Adams advised Respondent, while that internal process was not Respondent's business, in any event Respondent's proposal that the "Sector Office" would conduct certain procedures did not apply to Local 51's structure. (RT 133-4.)

- Respondent's April 23 proposal regarding dues checkoff sought to remove the Union's authorization form language by which members agreed to the period of time the authorization would remain effective and the windows of time they could revoke authorization. (JX 6(h).) At bargaining on April 23, 2019, Respondent wanted to talk about the Union's initiation fee, claiming it was too high and supposedly interfered with its ability to hire people – although the Union had had the same initiation fee structure for many years without incident[5] – and the Union responded that the amounts of the initiation fee and dues are the Union's business. (RT 128.)[6] Respondent's May 27, 2019 proposal continued to seek modification of the Union's internal terms of dues authorization. (JX 6(i).) On June 26, Respondent demanded information about the amount of dues and fees, Beck notices to employees, calculations of chargeable and non-chargeable amounts, and internal decision making documents regarding dues and fees, despite the Union's communications that the Union was exercising its right to decline to bargain about that non-mandatory topic. Biggs-Adams felt that the request had nothing to do with bargaining, but rather Respondent was demanding to interfere with internal Union operations in which CWA handles the calculations of chargeable amounts. (RT 155-6.) At the June 26 bargaining session, Biggs-Adams expressed that the Union felt Respondent was mucking about in something that was none of their business, by telling people that they will lower the Union's initiation fees and then making invasive information requests at the table. (RT 157.) At the June 27 bargaining session, Pautsch and Nevin were still insisting upon talking about the amount of the initiation fee and dues, and Pautsch was comparing the initiation fees in other locations. (RT 423-6.) Biggs-Adams continued to inform Respondent that the Union would not bargain over changes to the internal dues and initiation fee structure. (RT 163.) Respondent's August 15 proposal and October 7 proposals continued to seek modification of the Union's internal terms of dues authorization. (JX 6(l), (n), and (o).) Meanwhile, all along Respondent continued to represent to bargaining units members that it was trying to decrease the Union's dues and initiation fee at the bargaining table – in the memos dated May 31 (JX 25, third paragraph); June 20 (JX 26, second paragraph); October 14 (JX 43, second page, first Q&A on that page).

- In a series of proposals starting with the May 27, 2019 proposal and continuing through the last proposal on Article 3 before withdrawing recognition, Respondent demanded that Article 3 would require the dues checkoff authorization form to include language that the employee understands he/she could pay less if he/she becomes an objector. (JX 6(hi), 6(l), 6(n) and 6(o).) Moreover, management's proposals sought to require the authorization form to state a set statement of the percentage difference between full dues and agency

[5] RT 425.

[6] The company had not lost any new employees for failure to make an initiation fee payment. (RT 702-3.) Nor did Pautsch know what salaries employees were leaving for at competitor stations, where they went after leaving KOIN, or what reasons employees gave for leaving in exit interviews. (RT 704-6.)

fees (*Id.*), but that number is recalculated annually by CWA, so if a number were included in Article 3 and/or the authorization form, that number would be wrong within months. The Union explained this problem to Respondent (see JX 14, p. 000014 and RT 220-2), but Respondent persisted in using its proposal as an artificial obstacle to agreement regarding dues checkoff. Meanwhile, Respondent unilaterally discontinued already authorized dues checkoffs on August 2, 2019. (JX 31 and 32.)

- Respondent insisted that it would not agree to dues checkoff unless the Union pays Respondent an unjustified processing fee. In the January 2019 bargaining, Respondent was continuing to propose, as it had done since the March 22, 2018 proposal, that the Union pay Respondent $10 per employee per month. (JX (g).) In a series of Article 3 proposals starting with the April 23, 2019 proposal and continuing through the last proposal before Respondent withdrew recognition, Respondent proposed the Union pay Respondent $50.00 per month. (JX 6(h), (i), l), (n), (o).) Dues are 2.25 percent of gross earnings, which can be automatically calculated through a formula in a spreadsheet. The Union asked for information regarding the alleged "costs" of processing dues checkoff, and Respondent gave only vague and patently baseless responses that it takes time, supposedly "five or more hours per pay period" because the employees' pay is different every pay period depending upon the hours they work and the employees also receive expense reimbursements – calculations every employer must make anyway with or without dues checkoff. (RT 135-6, 163, 380, 423.)[7] The demand that the Union pay Respondent such a fee had no foundation in reality; instead, it was simply designed to artificially prevent coming to agreement.

4. <u>Failure to timely provide information relating to healthcare benefits</u>

On January 24, 2019, in attempts to negotiate healthcare benefits, the Union made a written request for Respondent to provide information regarding the COBRA rates and the employer contributions on Respondent's health plan. (JX 18.) The Union requested the information both for the purpose of negotiating economics – the cost of healthcare, the share the employer will bear, and the share the employees will bear affect wage negotiations as well -- and because Respondent's plan did not cover certain types of care for which the Union wanted to negotiate coverage, and if Respondent was not willing to provide the bargaining units with

[7] Respondent's argument, that it took the administrator extra time to "back out" the expense reimbursements to calculate the dues percentage of wages, is clearly disingenuous and smacks further of bad faith. A spreadsheet can apply a mathematical formula to the wage column instead of the total column for wages plus reimbursements for automated calculation of dues. And as Biggs-Adams pointed out, Respondent wanted to use a percentage of wages to determine the employees' contribution to healthcare.

coverage for those types of care under its own plan, the Union wanted to investigate other alternative plans. But to do so, the Union needed to know what cost Respondent dedicated to providing health benefits. Respondent does not dispute the relevance. (RT 701.)

Respondent did not respond at all to the Union's January 2019 request for the healthcare cost information, and when oral reminders did not produce any results, the Union followed up formally with another written request in November. (JX 45.) Respondent finally provided the information on December 9, 2019, shortly before withdrawing recognition. (JX 48.) Respondent provides no explanation why it delayed providing the information to the Union for most of the year. Respondent's representatives at the December 2019 bargaining meeting admitted that they had the 2020 amounts of the employer's cost (or in other words, the amounts Respondent allocated to the employer's cost of healthcare in 2020), so the Union followed up with another request, but Respondent never did provide that information. (RT 262-3, JX 50.)

D. WITHDRAWAL OF RECOGNITION

On January 8, 2020, Respondent advised the Union that it was withdrawing recognition from the Union in both bargaining units. (Joint Exh. 55.) Since that date, Respondent has refused to recognize the Union as the exclusive bargaining representative and has refused to meet for bargaining. (Joint Exh. 1, Stipulation 18.) At the same time, Respondent gathered the employees in the bargaining units for meetings to announce the "exciting news" that Respondent would not recognize the Union anymore, and there was a 45-day waiting period in which Respondent would not be able to raise their wages (imparting the implied message that they will get a raise now that Respondent was not bargaining with the Union anymore). (RT 453-4, GCX 4 and 7.)

Respondent did not have evidence that the Union had lost majority support as of January 8, 2020. Respondent called only one bargaining unit member to testify. Respondent misplaced sole reliance upon: a) Respondent's Exhibit 4, a purported list of bargaining units members in which Respondent purported to tabulate who did and did not have a dues checkoff authorization

on file, and b) hearsay anecdotes by Pat Nevin and Rick Brown about a few employees allegedly expressing dissatisfaction with the Union.

Respondent's Exhibit 4 was not an accurate list in the first place, since it was missing at least one employee in the bargaining units, Kristi Kenworthy. (RT 848; see GCX 21, p. 2, October 28, 2020 email acknowledging Ms. Kenworthy's work producing, setting up shoots, writing and editing.[8]) Respondent alleges in the exhibit that in one of the bargaining units, there were four dues checkoff authorizations out of 11 employees, and in the other, there were 15 dues checkoff authorizations out of 27 employees. Respondent's alleged tabulation of dues checkoff authorizations is not evidence of actual lack of majority support. Moreover, it has even less probative value in light of the fact that Respondent had not been honoring dues checkoff authorizations since August 2, 2019, and had so informed both the Union and the employees. (JX 31 and 32.)

After Respondent notified the Union and the employees that Respondent was withdrawing recognition, the Union prepared a petition to indicate that those signing wanted to continue being represented by the Union. (RT 301-2.) The stewards, Ellen Hansen, Robert Dingwall, and Matt Rashleigh talked to their co-workers in the bargaining units, whom they knew, and found that most of their co-workers did still wish to be represented by the Union, although many expressed that they were only willing to sign if there was no possibility of Respondent seeing who had signed, for fear of retaliation by Respondent. (RT 478, 504-6, 538-9.) The stewards were present when the co-employees signed, so they knew the signatures were genuine. (RT 842-3, 847.) The Union provided the signed petition to a neutral retired priest, Rev. Jack Mosbrucker, who compared the signatures with the names on Joint Exhibit 67, which were the units members listed in the November 2019 payroll records provided by Respondent to the Union, with the additions of post-November hires Coyle and Diggs and deletion of post-November separations Birmele, Leimbach, Lou, Reaves, and Wicks. (RT 551-2, 562-4, GCX

[8] According to the Union's list, Ms. Kenworthy is in the smaller unit of News, Creative Services Employees and Web Producers. (JX 67.)

13.) Rev. Mosbrucker counted the signatures that matched the names and verified that the signatures reflected majority support of 19 of 28 in the Technical Unit and 7 of 13 in the Production Unit. (GCX 13.)

Rev. Mosbrucker and the Union provided the certification, General Counsel Exhibit 13, to Respondent. (RT 552, GCX 14.) The Union demanded to continue bargaining, requested information for the December earnings of bargaining units' members, and noted Respondent's obligation to refrain from unilateral changes. (GCX 14.) Respondent did not respond. (RT 305.)

E. UNILATERAL CHANGES

1. Assignment of bargaining unit work outside the unit

The parties' expired CBA provided that with limited exceptions not applicable here, no person other than an employee covered by the CBA may perform the bargaining unit functions described therein, including, but not limited to, operating television broadcast equipment such as video recording and transmittal equipment (engineering employees); preparing and issuing shooting assignments (assignment editors) and shooting news video (news videographers). (JX 2, sections 12.2 and 12.5 on pp. 13-18.)

On September 30, 2019, Respondent assigned the work of shooting video at Trailblazers games to an individual who was not in either bargaining unit. Respondent did not notify the Union of this decision. (JX 1, Stipulation 17.)

Shop steward Robert Dingwall testified that only videographers in the bargaining unit are supposed to use "TVU" equipment, which refers to shooting video in the field for news or sports coverage. (RT 511-2.) Emails on November 24, 2019 and February 2, 2020 (GCX 17 and 18) reflected that a non-bargaining unit member, Travis Teich, was assigning himself to go in the field with the reporter using the TVU equipment. Before then, as far as Mr. Dingwall is aware, Mr. Teich had not performed work with the TVU. (RT 513.)

On January 2, 2020, Respondent assigned the work of setting up Respondent's morning television program to an individual who was not in either bargaining unit. Respondent did not notify the Union of this decision. (Joint Exh. 1, Stipulation 23.)

2. Removal of Union's bulletin boards

The expired CBA provided for up to two Union bulletin boards at Respondent's facility. (JX 2, section 3.2 at p. 5.) The Union actively used those bulletin boards to post negotiating bulletins and other Union bulletins, as well as posting information about things that were available for Union members, such as scholarships. (RT 458-9.)

On January 8, 2020, Respondent removed the Union bulletin boards at its facility. Respondent did not notify the Union of this decision. (*Id.*, Stipulation 19.)

3. Vacation policy

KOIN had a vacation selection policy that had been negotiated and agreed upon with the Union. (GCX 15, RT 470-1.) Two Photographers could take vacation at the same time in their department under the policy, except that generally no employee could select vacation during the sweeps periods identified in the policy, which were the February, May, and November sweeps. (GCX 15.) There was no July exception to the general rule that two Photographers could be off on vacation at the same time. (*Id.*)

Although in 2019, Respondent had permitted two Unit photographers to request vacation on July 4-7, 2019, the dates of the 2019 Portland Waterfront Blues Festival, in about January 2020, Respondent announced it would permit only one Unit Photographer to request vacation on July 2-5, 2020, the scheduled dates of the 2020 festival. Respondent did not notify the Union of this decision. (JX 1, Stipulation 21.)

In the 2021 vacation sign-ups calendar distributed on November 2, 2020, no one was allowed to select the Blues Festival week for vacation. (GC 16.)

4. Wage increase

On January 8, 2020, Respondent notified the employees in the two bargaining units that they would soon be receiving a 1.5 percent wage increase. Respondent did not notify the Union of this decision. (JX 1, Stipulation 20.)

On or about March 25, 2020, Respondent implemented the 1.5 percent wage increase for Unit employees retroactive to January 1, 2020. Respondent did not notify the Union of this decision. (*Id.*, Stipulation 22.)

F. DIRECTING EMPLOYEES NOT TO DISCUSS THE UNION AND OTHER INTERFERENCE

On January 20, 2020, Ms. Hansen and another bargaining unit employee, Travis Box, were getting coffee in the kitchen, and Ms. Hansen asked her co-worker how he felt about the Union. He said he was waiting for the dust to settle. Ms. Hansen's supervisor, Operations Manager Rick Brown, came up behind them and interrupted, "I wouldn't talk about that if I were you." (RT 463; GCX 11.)

On January 23, 2020, Ms. Hansen went to the Commercial Production area because a bargaining unit member named Colin Cashin had asked her a question, and Ms. Hansen wanted to give him a Union bulletin. Mr. Cashin was not at his office, so Ms. Hansen asked Neil Sparks, another bargaining unit member in the Commercial Production area, to give the bulletin to Mr. Cashin. Ms. Hansen did not involve Mr. Sparks in conversation, but simply asked him to give the bulletin to Colin when he came in, and then she left to go back downstairs. She passed Rick Brown in the hall. A couple of minutes later, Mr. Brown approached her and told her, "You are not to be handing out bulletins. We are not recognizing the union, and you cannot do that." He was angry and his voice was raised. (RT 466-8, GC 12.)

In the spring of 2020, Rick Brown gave Robert Dingwall a performance review in a meeting over Zoom. Mr. Dingwall testified that at the end of the review, Mr. Brown said that Mr. Dingwall would be getting a one percent raise. Mr. Dingwall asked why only one percent, when he knew several other people had gotten two percent. Mr. Brown got visibly angry and "told me that we're not supposed to be talking about our raises, and he knew who I had talked to,

and that he was going to talk to that person. And that if he wanted to, he could revoke our raises." (RT 514.)

Although Respondent called Mr. Brown to testify at the hearing, Mr. Brown did not refute Ms. Hansen's and Mr. Dingwall's testimony about Mr. Brown's conduct towards them.

II. LEGAL ANALYSIS

A. RESPONDENT FAILED AND REFUSED TO BARGAIN IN GOOD FAITH, INSTEAD ENGAGING IN "SURFACE BARGAINING" TACTICS

Respondent deployed various tactics to prevent bargaining progress in 2019, all the while campaigning to undermine the Union in the eyes of the bargaining units members.

Section 8(d) of the Act defines collective bargaining as the "mutual obligation" of the parties

> To meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement, or any questions arising thereunder, and the execution of a written contract incorporating any agreement reached.

The process of collective bargaining contemplates an ongoing dialogue between management and labor intended to resolve differences without disruption. Each party must bargain in good faith, making a genuine effort to reach agreement. Ascertaining subjective intent involves a review of the party's overall conduct and whether an inference of bad faith is supported under the totality of the circumstances. *See, e.g., Continental Ins. Co. v. NLRB,* 495 F.2d 44 (2d Cir. 1974). Conduct supporting a finding of bad faith may include tactics designed to delay, to denigrate and undermine the union, and to make it appear to the employees that are worse off with union representation than without. *Id.* Refusing to meet frequently or at length is also relevant. *Sparks Nugget, Inc. v. NLRB,* 968 F.2d 991, 995 (9th Cir. 1992). The nature of the bargaining demands may also demonstrate an intent to frustrate the possibility of reaching agreement, such as insisting on paying only the federal minimum wage (*Regency Service Carts, Inc.*, 345 NLRB 671 (2005), failing to compromise, proposing total control over wages, seniority and work rules (*Sparks Nugget, Inc., supra,* 968 F.2d at 996), and insisting upon a proposal

regarding a non-mandatory subject (*NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349* (1958), such as demanding a union reduce or eliminate initiation fees despite a union's exercise of its right to decline to negotiate that, which is its own internal affair (*Pleasant View Nursing Home, Inc.*, 335 NLRB 961 (2001), *enforcement granted in part and denied in par*t, 351 F.3d 747 (2003); *see also Social Services Union, Local 535, SEIU (North Bay Regional Center)*, 287 NLRB 1223 (1988) (union not required to respond to requests for information related to the amount of dues and fees)). Not all of these indicators are required; rather, a respondent will be found to have violated the Act when its conduct in its entirety reflects an intention on its part to avoid reaching an agreement.

In *Kellwood Co.*, 178 NLRB No. 8 (1969), *enforced* 434 F.2d 1069 (1970), an employer violated section 8(a)(5) with tactics to undermine the union in the eyes of the employees and make the union appear ineffective as the bargaining representative, including announcing a raise higher than any the company had ever offered the union, urging the employees that they need not pay a cent to the union to get it.

In *Safeway Trails*, 233 NLRB 1078 (1977), an employer acted in bad faith, even though it met with the union and made some bargaining concessions, where it sought to undermine and subvert the authority of a union's chief negotiator through a campaign blaming that negotiator for the failure to reach agreement.

As set forth above with references to the record in the Summary of Facts, Respondent engaged in delaying tactics; wrote numerous memos to the employees under the name of the KOIN General Manager disparaging the Union, often falsely, and misrepresenting to them that Respondent was negotiating with the Union to decrease the employees' dues and initiation fees; made proposals designed to prevent agreement, such as proposing health benefits be subject to change by management at any time, proposing changes to the Union's own internal procedures, and proposing the Union pay Respondent an unjustified monthly fee for dues checkoff; refused to make a wage proposal and failed to respond substantively to the Union's wage proposal; and

failed and refused to provide requested information related to health benefits for almost the entire year.

1. Bad faith regarding healthcare benefits bargaining

Respondent's healthcare proposal is analogous to the bad-faith proposal in *Regency Service Carts, supra*, of wages not exceeding the federal minimum wage, because Respondent was asking the Union to swallow language allowing Respondent to charge the employees the maximum percentage of their income allowable under the ACA. Respondent's healthcare proposal is also comparable to the bad faith proposals in *Sparks Nugget, supra,* since Respondent was asking the Union to agree that Respondent could change the health benefits at will.

Again, Respondent's conduct reflected its attitude that bargaining healthcare was a "waste of time." Pautsch, in Nevin's name, expressly advised employees that Union's attempts to bargain coverage of gender dysphoria treatment and abortion was a "waste of time." As to cost-bearing, Respondent delayed all year before providing the Union with the COBRA rates and employer contributions, with no legitimate explanation, then only provided the information shortly before withdrawing recognition.

To the extent Respondent contends its conduct was somehow justified by the Union's response to Respondent's request for information about members-only benefits (most of which were not healthcare insurance benefits), such contention would be completely devoid of merit. The Union declined to produce the information based upon a good-faith concern that it was not relevant to bargaining, since the Union cannot discriminate against non-members in negotiating the benefits of the collective bargaining agreement. (JX 34.) Offering the Nexstar plan to agency fee-payers would not prevent the risk of claims of improper discrimination; for example, if a health plan available only to union members covered abortion and gender dysphoria and the other did not, and an agency fee-payer could claim that was discriminatory. While Mr. Pautsch argues that he was thinking the Union member plan could be available just for Union members and a stipend and/or the Nexstar plan could be available for agency fee payers, he has no explanation how that could avoid legal problems – he claims he did not think about it. (RT 718-

9.) If we generously assume he really did not think about it, then the request for information was not serious. If he did think about it, then the inference is clear that he was harassing and baiting the Union instead of trying to work towards agreement. In any case, Respondent did not need information about NABET membership benefits in order to bargain health benefits under its own plan, the Entertainment Industry Flex Plan, or any other plan that can be made available to all regardless of Union membership status.

Thus, Respondent was not bargaining in good faith regarding healthcare.

2. Failure and refusal to bargain wages

Respondent's delaying and disparaging tactics are particularly significant in light of the fact that Respondent never made a wage proposal. While it is understood that both parties have the right to bargain "hard" and are not required to make concessions, Respondent's conduct went well beyond "hard bargaining" – Respondent never did provide a wage proposal to stand by in the first instance. Consequently, Respondent was unfairly demanding the Union to bargain against itself.

Mr. Pautsch argues that "if" he wanted to "end up at" one percent, back-and-forth counterproposals would take him in a direction that was higher than he wanted to go, but his testimony does not demonstrate good faith. First, it does not reflect a serious bargaining position in this case, because it does not address the fact that Respondent had been hiring employees at rates higher than the expired contract minimums, which had not been increased for five years. The market would not support hiring at the contract minimums, so new employees were hired at higher rates of pay. The Union's wage proposal reflected the need to bring up the contract minimums so that the longtime employees could be brought up in parity with the newer employees. Mr. Pautsch did not address that issue at all; rather, he merely dismissed the Union's proposal by saying it was crazy. Second, if Respondent did intend to provide a raise, even if it was only 1.5 percent, it was obliged to present that proposal to the Union as the bargaining representative. Third, again, if an employer makes a good-faith, reasonable wage proposal that can withstand the market, it is not required to go back and forth with incremental concessions –

but that's not what Respondent did. Respondent failed and refused to bargain wages in good faith.

3. Respondent sought to condition bargaining of mandatory subjects upon changes to the Union's dues and initiation fees amounts and internal procedures, which the Union had the right to decline to negotiate

A union's determinations and deliberations about the amounts of dues and fees are internal matters within a labor organization, and a labor organization is not required to bargain with an employer about those amounts and procedures. *Social Services Union, Local 535, SEIU (North Bay Regional Center)*, 287 NLRB No. 129 (1988) (quoting *Allied Chem. Workers, Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971)), enforced sub nom. *N. Bay Dev. Disabilities Servs., Inc. v. NLRB, 905 F.2d 476 (D.C.Cir.1990)*; see also *Pleasant view Nursing Home*, 335 NLRB 961, 963-964 (2001)[9] (following *North Bay Regional Center*, "…the amount of fees to be paid remains a matter to be resolved between the union and the employees, not between the employer and the union. That an employer may claim an economic interest in the matter does not change its essentially internal union character").

As discussed in the Summary of Facts with references to the record, Respondent's proposal regarding Article 2 sought a provision that the "Sector Office" of CWA would determine whether an employee is not in good standing, and the Sector Office would provide proof, which would not work with Local 51's structure. Respondent's proposal regarding Article 3 would have the Union agree to include language in the authorization form that the employee would pay less if he/she becomes an objector; Respondent also proposed to include a set percentage difference between full dues and agency fees, which would not work with CWA's process of determining chargeable amounts annually.

While Respondent did not make a written proposal regarding the amounts of the Union's dues and initiation fee, Respondent was misrepresenting to the bargaining units members that Respondent was endeavoring to reduce those amounts at the bargaining table. (See the memos

[9] The Sixth Circuit Court of Appeals partially denied enforcement on grounds not applicable here – that the impasse in that case was not caused by disagreement on the permissive subject. *Pleasantview Nursing Home. v. NLRB*, 351 F.3d 747, 761 (6th Cir. 2003).

dated May 31 (JX 25, third paragraph); June 20 (JX 26, second paragraph); October 14 (JX 43, second page, first Q&A on that page).) The Union advised Respondent that it was not Respondent's business, and Pautsch knew he could not make the Union bargain about the amounts of the dues and initiation fee. However, in meetings that were supposed to be bargaining meetings, he and Nevin frequently reverted to challenging the amounts of the Union's dues and initiation fees. (RT 128, 157, 423-6.)

At the same time, Respondent was making invasive information requests for the Union's *Beck* notices and other correspondence between the Union and bargaining units' members, and internal documents regarding the amounts of dues and amounts spent on "lobbying." (JX 27.) In response, the Union advised that there did not appear to be any relevance to bargaining, and if Respondent disagreed, it should explain why. (JX 28.) Respondent gave no explanation, but instead vaguely opined that the authorization form copied into the expired collective bargaining agreement supposedly "violated" elements of General Counsel Memorandum 19-4 (which is not binding law) and "employee rights." (JX 29.) While the General Counsel Memo 19-4 discusses an issue about whether chargeable/non-chargeable amounts should be included in initial *Beck* notices, such a debate would not have been relevant to the parties' bargaining regarding Article 3. Whatever the content of *Beck* notices, there is no legal requirement that such content must be incorporated into dues checkoff authorization forms. And Respondent certainly has identified any authority which would require a union to provide an employer with all manner of internal documents and correspondence between the union and its members.

Mr. Pautsch argues that incorporating the dues checkoff authorization form, as the expired contract did in Article 3, prompted him to propose changes in the language that were consistent with his legal interpretation (although the legal principle he is concerned with is not based upon settled, existing law but rather upon differing opinions about what the law should be) – but demanding the Union change its form and its internal procedure was not the only option, and Respondent's sustained insistence upon the proposal was merely obstructive. Respondent never proposed to agree to dues checkoff while dropping the copy of the authorization form from

Article 3. Rather, Respondent originally proposed to delete dues checkoff entirely (JX 6(a)), then subsequent proposals sought to modify the terms of authorization in ways that the Union found unacceptable. Similarly, Respondent never proposed agreeing to dues checkoff with a disclaimer relieving Respondent of any responsibility for the legal validity of any dues authorization form the Union may use. If Respondent had had any concern that Board law may change in future such that the Union's authorization form language may need to be changed, Respondent could have proposed a savings clause or other provision to account for such a contingency, but that was not what Respondent was doing.

Respondent contends that the Union bargained in bad faith, but that allegation has already been found to be unmeritorious in the dismissal of charge 19-CB-260215, and the dismissal has been upheld on appeal. (JX 66, and see charge at JX 64, pp. 000013-17.)

To the extent Respondent misplaces reliance upon a past Union welcome letter to a KOIN employee; the letter did not justify Respondent's conduct in bargaining with the Union. Mr. Pautsch referred in his testimony to Respondent's Exhibit 3, an August 15, 2019 email from Respondent to the Union, attaching a February 27, 2019 "welcome" package from the Union to a KOIN employee. While the February 27, 2019 letter stated that "we have a collective bargaining agreement" with KOIN, without clarifying that the agreement was expired, the letter from the Union to a bargaining unit member did not involve Respondent. No charge was brought regarding the February 27, 2019 letter. In any event, while the Union does not admit any violation of the Act, the Union had already corrected the welcome letter soon thereafter, and the Union has resolved any related issue in the settlement of 19-CB-244300 (JX 63, p. 000024, and non-admission clause at p. 000021). The letter did not give Respondent a right to make the Union bargain with Respondent about changing the Union's own internal procedures for determining whether a person is a member in good standing or for members to agree to dues authorization.

In sum, if Respondent had had any genuine concern about the language of Article 3, there would have been ways to handle it in good faith without derailing bargaining. But instead,

Respondent seized upon the Union's unwillingness to bargain about its own internal affairs – which the Union had the right to decline to do – and Respondent misused it to obstruct bargaining and avoid progress towards reaching agreement.

a. At a minimum, Respondent's tactic of making proposals on internal Union affairs is one of the facts demonstrating Respondent's bad faith under the totality of the circumstances.

While refusing to make a wage proposal and obstructing progress on healthcare benefits, Respondent repeatedly and insistently reverted to intrusive requests and proposals about the Union's dues and initiation fees and related internal procedures. This tactic exhibited Respondent's desire to undermine the Union instead of reaching common ground.

Refusing to discuss one realm of issues until the parties reach agreement on others can be evidence of bad faith. *Modern Mfg. Co*., 292 NLRB No. 3, p. 10 (1988). Similarly, although the substance of a proposal alone is generally not determinative, in the totality of circumstances, unreasonable proposals which any self-respecting union would refuse can support a finding of bad faith bargaining. *Id.* at p. 11; *Sparks Nugget, Inc., supra,* 968 F.2d at 996. Proposals designed to marginalize the union are particularly suspect. *Hydrotherm, Inc.*, 302 NLRB 990 (1991).

b. Respondent's conduct also constituted a *per se* violation -- conditioning agreement upon mandatory subjects on acceptance of a non-mandatory proposal.

Conditioning agreement upon mandatory subjects on acceptance of a non-mandatory proposal violates section 8(a)(5). *NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349 (1958*); *Smurfit-Stone Container Enterprises*, 357 NLRB 1732, 1735-1736 (2011). In *Smurfit-Stone*, an employer violated section 8(a)(5) by conditioning a plant-closure effects agreement on a union's acceptance of a non-mandatory proposal -- midterm cancellation of the parties' collective bargaining agreement. Although the employer did not "declare impasse" based upon its non-mandatory proposal, it nevertheless withdrew its last, best and final closure-effects offer and ceased bargaining, then went ahead and closed the plant. *Id.* at 1733, 1736. See also *Island Architectural Woodwork, Inc.*, 364 NLRB No. 73 (2016) at pp. 5, 10, in which an

employer violated section 8(a)(5) by conditioning agreement to a successor collective bargaining agreement upon a union's agreement to agree to modify the scope of the unit, which was unlawful even though the parties had not finished bargaining other issues.

Respondent discontinued dues checkoff in August 2019, then Respondent withdrew recognition on January 8, 2020 and refused to bargain thenceforth. Analogous to the facts in *Smurfit-Stone*, Respondent effectively withdrew from the negotiating process and implemented its decision. The parties were aware that Respondent could not have legally declared impasse upon a proposal regarding the amount of the Union's dues or fees or regarding internal procedures of the Union. It is well-established that insistence to impasse upon a proposal on a non-mandatory subject of bargaining constitutes a *per se* violation of the Act. *NLRB v. Borg-Warner Corp.*, *supra*; *New Seasons, Inc.*, 346 NLRB 610, 623 (2006). At the same time, the Union could not have effectively agreed only to proposed terms on mandatory subjects that Respondent had packaged with unwanted proposals on non-mandatory subjects. See *Nordstrom, Inc.*, 229 NLRB 601, 601-602 (1977). Thus, for example, the Union could not have unilaterally separated union security and dues checkoff from the changes in the Union's internal process that Respondent proposed, then compel Respondent to sign a contract, because Respondent's proposals to change the Union's internal affairs were part and parcel of Respondent's proposals for Articles 2 and 3. Therefore, Respondent's insistence upon its non-mandatory proposals until Respondent withdrew recognition constituted conditioning agreement to mandatory subjects upon proposals on non-mandatory subjects that the Union was unwilling to negotiate, in violation of the Act.

For all the reasons discussed above, Respondent violated section 8(a)(5) by failing and refusing to bargain in good faith during the 2019 negotiations.

B. INTERFERENCE

The Union joins in the Counsel for General Counsel's brief regarding the issue of Respondent's violation of section 8(a)(1) and adds:

It is undisputed that Rick Brown, Respondent's managerial employee and agent, gave directives to Ellen Hansen to restrain her from talking with co-employees about the Union and giving them Union bulletins; gave Robert Dingwall a directive not to talk with co-employees about their wage raises; and told Mr. Dingwall in the same breath that he (Brown) could withhold their raises. Respondent's interference with the employees' section 7 rights is plain and blatant. It is no wonder that the employees at KOIN fear hostility and retaliation if their support for the Union is revealed to management.

Employer conduct that tends to restrain or interfere with employees in the free exercise of their Section 7 rights violates the Act. *See*, e.g., *Southwire Co.*, 282 NLRB 916, 918 (1987), *citing Hanes Hosiery, 219 NLRB 338 (1975*). Conduct which "could reasonably be construed by employees as an attempt by the Respondent to document an employee's Section 7 activities…would have the foreseeable consequence of restraining union proponents from attempting to persuade other employees to support the union." *Ryder Truck Rental, supra,* at 762. See also 370 NLRB No. 68, in which the Board has recently affirmed the Administrative Law Judge's determination that Respondent unlawfully interfered with Ellen Hansen's protected activities by reprimanding her for talking to a co-employee about the Union.

Here, Mr. Brown's directives were directly restraining protected activity, in violation of section 8(a)(1). Respondent's flagrant intimidation and interference with section 7-protected activities must be stopped.

C. RESPONDENT UNLAWFULLY WITHDREW RECOGNITION OF THE UNION AS THE COLLECTIVE BARGAINING REPRESENTATIVE OF THE UNITS

The Union joins in the Counsel for General Counsel's brief on this issue, and adds that Respondent has no basis to shift the burden of proof upon the Union. Respondent had the burden at hearing to support its conclusion that the Union had actually lost majority support[10], and it

[10] *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 725 (2001), partially overruled on other grounds in *Johnson Controls, Inc.*, 368 NLRB No. 20 (2019). The Board in *Johnson Controls* specifically acknowledged the *Levitz* rule that the employer has the burden to show actual loss of support at the time of withdrawing recognition, and the Board did not disturb that aspect of *Levitz.* See *Johnson Controls* at p. 5 and n. 26.

could not meet that burden[11]. Nor could Respondent meet its burden of proof by subpoenaing documents after it has already withdrawn recognition. The well-established general rule is that a respondent may not obtain copies of union authorization cards by subpoena due to the potential chilling effect on union activity. *National Telephone Directory Corp.*, 319 NLRB 420, 421-422 (1995). The Board has applied the same rule to other types of materials that might reveal protected employee conduct. See *Chino Valley Medical Center*, 362 NLRB No. 32, n. 1 (2015); *Sheraton Anchorage,* 19-CA-32148 et al., unpub. Board order issued January 21, 2011 (quashing a subpoena that sought all forms indicating that employees wanted continued representation), cited in the ALJ Benchbook, §8-455. And as previously discussed in the petition to revoke subpoena, allowing Respondent to subpoena documents showing employee support, even with the names redacted, would give bargaining unit members reason to fear that their support for the Union would be exposed and that they could be subject to antagonism from management. The two bargaining units represented by the Union are each fairly small. Since the Union has already been representing them since well before Nexstar acquired the station, the Union did not sign up bargaining unit members all at once prior to or on January 8, 2020. Rather, supporters have generally signed up as Union members as they have been hired, or approximately soon thereafter. Therefore, employees would have reason for concern that the employer would be able to deduce who supports the Union based upon the dates of documents showing their support and identification of their bargaining unit. Accordingly, Respondent's subpoena seeking proof of support was properly revoked, and it certainly does not shift the burden of proof upon the Union.

D. UNILATERAL CHANGES

As set forth in part E of the Summary of Facts above, Respondent made unilateral changes by assigning bargaining unit work to employees outside the bargaining unit; removing the Union's bulletin boards; changing the vacation selection policy; and instituting a 1.5 percent wage increase for all bargaining units employees. The facts are undisputed. Respondent

[11] Evidence that dues checkoff is not on file for a majority of a unit is insufficient. *Levitz, supra*, at 729.

concedes that if the withdrawal of recognition was unlawful, the unilateral changes were likewise unlawful (RT 34, Respondent's opening statement); so Respondent does not dispute that the changes were made in matters that are within the scope of mandatory bargaining.

The Union joins in the Counsel for General Counsel's brief, and adds that these unilateral changes should be considered particularly egregious in the context of this case. After Respondent refused to make a wage proposal to the Union in two years of bargaining, Respondent withdrew recognition and immediately informed the employees that, now that Respondent was not going to be bargaining with the Union anymore, in 45 days they would all be getting a raise. Obviously, Respondent's conduct is destructive to the bargaining process and directly attacks the employees' ability to have any faith in it. Respondent blatantly showed the employees its attitude that it would do what it wanted, with no respect for their right to have the Union bargain for something better on their behalf. And taking down the Union's bulletin boards robbed the Union of one of the important ways the Union could communicate with bargaining unit members.

III. REMEDIES

The Union seeks an order requiring Respondent to restore recognition of the Union as the collective bargaining representative of the bargaining units; return to the bargaining table and bargain in good faith with the Union; restore the Union's bulletin boards; cease and desist from unilaterally assigning bargaining unit work to non-bargaining unit members; cease and desist from interference, intimidation and coercion in violation of represented employees' section 7 rights; rescind any and all directives to employees restraining them from talking about the Union, distributing Union bulletins, and talking with other employees about wages, hours, and terms and conditions of employment; and make a posting. The remedy should also include the following:

As the normal and customary practice for represented employees to receive announcements from Respondent is by email, bulletin boards, and staff meetings, Respondent should be required to give notice of the Order using all of those methods (including, if staff are

not meeting in person due to the pandemic, giving notice to the represented employees by videoconference);

Respondent should be required to post permanently the Board's employee rights notice. https://www.nlrb.gov/poster. The Courts that invalidated the rule noted that such a notice could be part of a remedy for specific unfair labor practices. It is time for the Board to impose the requirement for a lengthy posting of that notice as a remedy for unfair labor practices.

Additionally, any notice that is posted should be posted for the period of time from when the violation began until the notice is posted. The short period of sixty (60) days only encourages employers to delay proceedings, because the notice posting will be so short and so far in the future.

The Notice should be included with payroll statements.

The Board's Notice and the Decision of the Board should be mailed to all employees. Simply posting the notice without further explanation of what occurred in the proceedings is not adequate notice for employees. The Board Decision should be mailed to former employees and provided to current employees.

Notice reading should be required in this matter. That Notice reading should require that a Board Agent read the Notice and allow employees to inquire as to the scope of the remedy and the effect of the remedy. Simply reading a Notice without explanation is inadequate. Behaviorists have noted that, "[t]aken by itself, face-to-face communication has a greater impact than any other single medium." Research suggests that this opportunity for face-to-face, two-way communication is vital to effective transmission of the intended message, as it "clarifies ambiguities, and increases the probability that the sender and the receiver are connecting appropriately." Accordingly, a case study of over five hundred NLRB cases, commissioned by the Chairman in 1966, strongly advocated for the adoption of such a remedy, recommending "providing an opportunity on company time and property for a Board Agent to read the Board Notice to all employees and to answer their questions." The employer should not be present. The Union should be notified and allowed to be present. This should be on work time and paid.

If the employees are working piece rate, the rate of pay should be equal to their highest rate of pay to avoid any disincentive to attend the reading.

The traditional notice is also inadequate. The standard Board notice should contain an affirmative statement of the unlawful conduct. We suggest the following:

> We have been found to have violated the National Labor Relations Act. We failed and refused to bargain in good faith; unlawfully withdrew recognition without sufficient evidence; made unilateral changes to matters within the scope of bargaining without giving your Union advance notice and opportunity to bargain those decisions; and illegally interfered with employees' protected activities. We apologize. We have now been ordered to restore recognition, bargain in good faith, cease and desist from our illegal conduct, rescind our illegal directive restraining employees from talking about the Union, rescind our illegal directive restraining employees from distributing Union bulletins, rescind our illegal directive restraining employees from talking about your wages, and restore the Union's bulletin boards. We ask your forgiveness for violating the National Labor Relations Act.

Absent some affirmative statement of the unlawful conduct, the employees will not understand the arcane language of the notice. Nor is the notice sufficient without such an admission. In effect, the way the notice is framed is the equivalent of a statement that the employer will not do specified conduct, not an admission or recognition that it did anything wrong to begin with.

The Notice should be incorporated on any company screensavers or opening windows or screens for all computers for the length of the posting period.

The Notice should require that the person signing the notice have his or her name on the notice. This avoids the common practice where someone scrawls a name to avoid being identified with the notice, and the employees have no idea who signed it.

The employees should be allowed work time to read the Board's Decision and Notice. To require that they read the Notice, whether by email, on the wall or at home, on their own time is to punish them for their employer's misdeeds.

The Notice should be read to employees by a Board agent outside the presence of management. Representatives of the Charging Party should be present. Employees should be allowed to ask questions.

Additionally, Respondent should be commanded to cause Charles Pautsch and Rick Brown, as perpetrators of the illegal acts on behalf of Respondent who are still present at Nexstar, to personally apologize to Carrie Biggs-Adams, Ellen Hansen, Robert Dingwall, and Matthew Rashleigh.

Dated: January 22, 2021

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: ANNE I. YEN

Attorneys for Charging Party National Association of Broadcast Employees & Technicians, the Broadcasting and Cable Television Workers Sector of the Communications Workers of America, Local 51, AFL-CIO

PROOF OF SERVICE
(CCP **§ 1013)**

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On January 22, 2021, I served the following documents in the manner described below:

POST-HEARING BRIEF TO THE ADMINISTRATIVE LAW JUDGE BY CHARGING PARTY, NABET-CWA LOCAL 51

☑ BY ELECTRONIC SERVICE By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from lgutierrez@unioncounsel.net to the email addresses set forth above.

On the following part(ies) in this action:

National Labor Relations Board
c/o Ms. Amita B. Tracy care of Vanise Lee
Administrative Law Judge
Email: vanise.lee@nlrb.gov

National Labor Relations Board
c/o Elizabeth DeVleming
Field Attorney
Email: Elizabeth.DeVleming@nlrb.gov

Constangy Brooks Smith & Prophete LLP
c/o Mr. Charles Roberts, III;
Mr. Timothy Davis
Attorneys for Charged Party/Respondent
Email: CRoberts@constangy.com
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National Labor Relations Board
c/o Sarah Burke
Field Attorney
Email: Sarah.Burke@nlrb.gov

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on January 22, 2021 at Emeryville, California

/s/ Linda Gutierrez
Linda Gutierrez